

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LIEBB,	)	No. C 04-950 CW (PR)
	)	
Plaintiff,	)	RELATED CASE: No. C 04-4213 CW (PR)
	)	
v.	)	ORDER (1) DENYING DEFENDANT'S MOTION
	)	FOR JUDGMENT ON THE PLEADINGS AND
	)	REQUEST TO STAY PROCEEDINGS;
	)	(2) GRANTING PLAINTIFF'S MOTION FOR
C. DALY,	)	RECONSIDERATION; (3) REFERRING CASE
Board of Parole Hearings	)	TO A MAGISTRATE JUDGE FOR DISCOVERY
Commissioner,	)	PURPOSES; AND (4) DENYING
	)	PLAINTIFF'S RENEWED MOTION FOR
Defendant.	)	APPOINTMENT OF COUNSEL
	)	
_____	)	(Docket nos. 17, 19, 21, 22)

BACKGROUND

Plaintiff is a prisoner incarcerated at San Quentin State Prison (SQSP). In 2004 he filed two actions, one a civil rights action brought pursuant to 42 U.S.C. § 1983, Liebb v. Daly, Case No. C 04-950 CW (PR), and the other a petition for a writ of habeas brought pursuant to 28 U.S.C. § 2254, Liebb v. Brown, Case No. C 04-4213 CW (PR). Both actions challenged the constitutional validity of Liebb's July 17, 2003, parole suitability hearing before the California Board of Parole Hearings (Board),<sup>1</sup> and the procedures the Board relies upon to grant or deny parole to prisoners serving indeterminate sentences for murder.

In an Order dated November 10, 2004, the Court conducted a preliminary review of both actions. With respect to the § 1983 action, the Court determined that the claims in the complaint must be raised in a federal petition for a writ of habeas corpus and

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<sup>1</sup> The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 dismissed the civil rights action without prejudice. In the habeas  
2 action, the Court issued an Order to Show Cause. An answer and a  
3 traverse were filed by the parties. In an Order dated August 24,  
4 2005, the Court granted Plaintiff leave to conduct limited  
5 discovery in his habeas action. The habeas action was later  
6 referred for discovery purposes to Magistrate Judge James Larson,  
7 who has since granted some of Plaintiff's discovery requests.

8 Meanwhile, on June 1, 2005, Plaintiff filed a motion in the  
9 closed § 1983 action seeking leave to file an amended complaint in  
10 light of the Supreme Court's March 7, 2005 opinion in Wilkinson v.  
11 Dotson, 544 U.S. 74, 83-84 (2005), which held that prisoners could  
12 challenge the constitutionality of state parole procedures in a  
13 § 1983 action seeking declaratory and injunctive relief and were  
14 not required to seek relief exclusively under federal habeas  
15 statutes. Plaintiff filed a proposed amended complaint alleging  
16 that the Board's hearing procedures and decision-making processes  
17 to deny parole to convicted murderers did not comply with the  
18 constitutional mandates of due process.

19 In an Order dated February 16, 2006, the Court found that  
20 Wilkinson clarified that claims such as those Plaintiff raised can  
21 be brought in a § 1983 action. The Court granted Plaintiff's  
22 motion for leave to file an amended complaint in Case No. C 04-950  
23 CW and directed the Clerk of the Court to reopen this action.

24 On March 1, 2006, Plaintiff filed a request for appointment of  
25 counsel, and on June 30, 2006, Plaintiff filed a motion to compel  
26 discovery. In an Order dated March 12, 2007, the Court denied both  
27 motions. (Mar. 12, 2007 Order at 2-3.) The Court denied  
28 Plaintiff's motion to compel as premature for failing to comply

1 with the meet and confer requirement of N.D. Cal. Local Rule 37-1  
2 and Fed. R. Civ. P. 37(a)(2)(B). (Id. at 3.)

3 Before the Court is Defendant's motion for judgment on the  
4 pleadings pursuant to Fed. R. Civ. P. 12(c) on grounds that there  
5 is no issue of material fact and that Defendant is entitled to  
6 judgment as a matter of law.<sup>2</sup> (Mot. for Judgment on the Pleadings  
7 at 1.) Alternatively, Defendant requests that the Court stay these  
8 proceedings pending the resolution of Plaintiff's related habeas  
9 action. (Id. at 2.) Plaintiff has filed an opposition to  
10 Defendant's motion and has renewed his request for appointment of  
11 counsel. He has also filed a motion for reconsideration of the  
12 Court's denial of his motion to compel.

13 Having considered all of the papers filed by the parties, the  
14 Court DENIES Defendant's motion for judgment on the pleadings and  
15 request to stay proceedings. Defendant may file a motion for  
16 summary judgment under Federal Rule of Civil Procedure 56, if  
17 appropriate. The Court GRANTS Plaintiff's motion for  
18 reconsideration, REFERS the case to a magistrate judge for  
19 discovery purposes, and DENIES Plaintiff's renewed motion for  
20 appointment of counsel.

#### 21 DISCUSSION

##### 22 I. Defendant's Motion for Judgment on the Pleadings

23 It is well-settled that the standard applied to Rule 12(c)  
24 motions is the same as that applied to Rule 12(b)(6) motions. Hal  
25 Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th  
26

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27 <sup>2</sup> Defendant also argues that this action should be dismissed for  
28 failure to state a claim because Plaintiff has no standing to request  
relief on behalf of other inmates. (Mot. for Judgment on Pleadings  
at 5-6.) The Court finds no merit to Defendant's argument because  
Plaintiff does not purport to sue on behalf of any other inmates.

1 Cir. 1990). That is, judgment on the pleadings is appropriate only  
2 when the moving party clearly establishes eligibility for judgment  
3 as a matter of law and that there is no material issue of fact on  
4 the face of the pleadings. Id. As with Rule 12(b)(6) motions,  
5 judgment on the pleadings is improper if a court must go beyond the  
6 pleadings to resolve an issue. Id. Such a proceeding must be  
7 brought in the form of a motion for summary judgment. Id.

8 Judgment on the pleadings is inappropriate in this action.  
9 Defendant's argument that Plaintiff's amended complaint "criticizes  
10 the Board's hearing procedures and decision-making processes for  
11 inmates in conclusory terms" is unavailing. It is clear in his  
12 amended complaint that Plaintiff is seeking relief for the  
13 "violation of his due process rights at his July 17, 2003 parole  
14 suitability hearing" at which Defendant presided. (Am. Compl. at  
15 1.) The Court cannot decide this case on the pleadings because it  
16 must consider matters outside the pleadings, such as how long  
17 Plaintiff had been incarcerated prior to his parole hearing and the  
18 factors the Board considered before finding Plaintiff unsuitable  
19 for parole, including whether Plaintiff's commitment offense  
20 weighed heavily in the Board's determination.

21 Accordingly, the Court DENIES Defendant's motion for judgment  
22 on the pleadings. Defendant's request to stay proceedings is also  
23 DENIED. Defendant may file a motion for summary judgment. The  
24 parties shall abide by the briefing schedule outlined below.

25 II. Plaintiff's Motion for Reconsideration

26 In his motion for reconsideration, Plaintiff has shown that he  
27 has satisfied the "meet and confer" requirements of N.D. Cal. Local  
28 Rule 37-1 and Fed. R. Civ. P. 37(a)(2)(B). (Mot. for Recons.

1 Attach. 1-7.) Accordingly, the Court GRANTS Plaintiff's motion for  
2 reconsideration.

3 Pursuant to Local Rule 72-1, Plaintiff's Motion to Compel  
4 (docket no. 15) and all further discovery motions filed in the  
5 above-captioned case are referred to a Magistrate Judge Larson, who  
6 handled the discovery matters in Plaintiff's habeas action.

7 III. Plaintiff's Renewed Motion for Appointment of Counsel

8 On March 1, 2006, Plaintiff claimed that he was unable to  
9 litigate the present action on his own behalf because he did not  
10 have the ability effectively to manage and prosecute the discovery  
11 requests he sought. The Court denied Plaintiff's first request for  
12 appointment of counsel as premature because it was too early to  
13 assess the existence of exceptional circumstances which would  
14 warrant appointing counsel. (Mar. 12, 2007 Order at 2.) In doing  
15 so, the Court noted Plaintiff's ability adequately to articulate  
16 his claims in light of the complexity of the issues. See Agyeman  
17 v. Corr. Corp. of Am., 390 F.3d 1101, 1103 (9th Cir. 2004).

18 However, the Court did not preclude Plaintiff from filing a renewed  
19 motion for appointment of counsel at a later date. (March 12, 2007  
20 Order at 3.)

21 In his opposition to the motion for judgment on the pleadings,  
22 Plaintiff renews his motion for appointment of counsel. (Opp'n at  
23 6.) He argues that his "efforts to obtain needed discovery from  
24 the Defendant have been met with indifference and lack of  
25 cooperation." (Id.) Nevertheless, in light of the Court's order  
26 referring this case to Magistrate Judge Larson for discovery  
27 purposes, the Court DENIES Plaintiff's renewed motion for  
28 appointment of counsel. However, Plaintiff may renew his

1 appointment of counsel motion after Defendant has filed a summary  
2 judgment motion. If the Court finds that appointment of counsel is  
3 warranted, it will seek volunteer counsel to represent Plaintiff.

4 CONCLUSION

5 1. Defendant's motion for judgment on the pleadings and  
6 request to stay proceedings (docket no. 19) is DENIED.

7 2. In order to expedite the resolution of this case, the  
8 Court orders as follows:

9 a. No later than ninety (90) days from the date of this  
10 Order, Defendant shall file a motion for summary  
11 judgment or other dispositive motion. The motion  
12 shall be supported by adequate factual documentation  
13 and shall conform in all respects to Federal Rule of  
14 Civil Procedure 56, and shall include as exhibits  
15 all records and incident reports stemming from the  
16 events at issue. If Defendant is of the opinion  
17 that this case cannot be resolved by summary  
18 judgment, Defendant shall so inform the Court prior  
19 to the date the summary judgment motion is due. All  
20 papers filed with the Court shall be promptly served  
21 on Plaintiff.

22 b. Plaintiff's opposition to Defendant's dispositive  
23 motion shall be filed with the Court and served on  
24 Defendant no later than thirty (30) days from the  
25 date Defendant's motion is filed. The Ninth Circuit  
26 has held that the following notice should be given  
27 to pro se plaintiffs facing a summary judgment  
28 motion:

1 The defendants have made a motion for  
2 summary judgment by which they seek to  
3 have your case dismissed. A motion for  
4 summary judgment under Rule 56 of the  
Federal Rules of Civil Procedure will, if  
granted, end your case.

5 Rule 56 tells you what you must do in  
6 order to oppose a motion for summary  
7 judgment. Generally, summary judgment  
8 must be granted when there is no genuine  
9 issue of material fact -- that is, if  
10 there is no real dispute about any fact  
11 that would affect the result of your case,  
12 the party who asked for summary judgment  
13 is entitled to judgment as a matter of  
14 law, which will end your case. When a  
15 party you are suing makes a motion for  
16 summary judgment that is properly  
17 supported by declarations (or other sworn  
18 testimony), you cannot simply rely on what  
19 your complaint says. Instead, you must  
20 set out specific facts in declarations,  
21 depositions, answers to interrogatories,  
22 or authenticated documents, as provided in  
23 Rule 56(e), that contradict the facts  
24 shown in the defendant's declarations and  
25 documents and show that there is a genuine  
26 issue of material fact for trial. If you  
27 do not submit your own evidence in  
28 opposition, summary judgment, if  
appropriate, may be entered against you.  
If summary judgment is granted [in favor  
of the defendants], your case will be  
dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir.  
1998) (en banc).

21 Plaintiff is advised to read Rule 56 of the Federal  
22 Rules of Civil Procedure and Celotex Corp. v.  
23 Catrett, 477 U.S. 317 (1986) (party opposing summary  
24 judgment must come forward with evidence showing  
25 triable issues of material fact on every essential  
26 element of his claim). Plaintiff is cautioned that  
27 because he bears the burden of proving his  
28 allegations in this case, he must be prepared to

1 produce evidence in support of those allegations  
2 when he files his opposition to Defendant's  
3 dispositive motion. Such evidence may include sworn  
4 declarations from himself and other witnesses, and  
5 copies of documents authenticated by sworn  
6 declaration. Plaintiff will not be able to avoid  
7 summary judgment simply by repeating the allegations  
8 of his complaint.

9 c. If Defendant wishes to file a reply brief, Defendant  
10 shall do so no later than thirty (30) days after the  
11 date Plaintiff's opposition is filed.

12 d. The motion shall be deemed submitted as of the date  
13 the reply brief is due. No hearing will be held on  
14 the motion unless the Court so orders at a later  
15 date.

16 e. All communications by Plaintiff with the Court must  
17 be served on Defendant's counsel.

18 f. It is Plaintiff's responsibility to prosecute this  
19 case. Plaintiff must keep the Court informed of any  
20 change of address and must comply with the Court's  
21 orders in a timely fashion. Failure to do so may  
22 result in the dismissal of this action for failure  
23 to prosecute pursuant to Federal Rule of Civil  
24 Procedure 41(b).

25 g. Extensions of time are not favored. A party making  
26 a motion for an extension of time is not relieved  
27 from his or her duty to comply with the deadlines  
28 set by the Court merely by having made a motion for



1 an extension of time. The party making the motion  
2 must still meet the deadlines set by the Court until  
3 an order addressing the motion for an extension of  
4 time is issued. Any motion for an extension of time  
5 must be filed no later than ten (10) days prior to  
6 the deadline sought to be extended.

7 3. Plaintiff's motion for reconsideration (docket no. 17) is  
8 GRANTED. The Court REFERS Plaintiff's Motion to Compel (docket no.  
9 15) and all further discovery motions filed in the above-captioned  
10 case to Magistrate Judge Larson for discovery purposes pursuant to  
11 Local Rule 72-1.

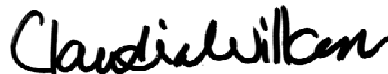
12 4. The Court DENIES Plaintiff's renewed motion for  
13 appointment of counsel (docket no. 21).

14 5. Plaintiff's requests that the Court take judicial notice  
15 of the findings by the Santa Clara County Superior Court in In re  
16 Viet Mike Ngo On Habeas Corpus (Case No. 127611), In re Donnell E.  
17 Jameison On Habeas Corpus (Case No. 71194), and In re Arthur  
18 Criscione On Habeas Corpus (Case No. 71614), and by the California  
19 Court of Appeal in In re Sandra David Lawrence On Habeas Corpus  
20 (Case No. B190874) (docket nos. 21, 22) are GRANTED.

21 6. This Order terminates Docket nos. 17, 19, 21 and 22.

22 IT IS SO ORDERED.

23 DATED: 3/31/08



24 \_\_\_\_\_  
25 CLAUDIA WILKEN  
26 United States District Judge  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LIEBB,

Plaintiff,

v.

BROWN et al,

Defendant.

Case Number: CV04-04213 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 31, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: March 31, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk

United States District Court  
For the Northern District of California